2010

State of Utah v. Larry Bosh, and D. Shawn Benson : Brief of Appellee

Utah Court of Appeals

IN THE SUPREME COURT OF UTAH

STATE OF UTAH, Plaintiff/Appellant, vs. LARRY BOSH, and D. SHAWN BENSON, *et al.* Defendants.	Case No. 20100530 – SC
MONEY & MORE INVESTORS, LLC, Intervenor/Appellee.	

BRIEF OF APPELLEE

AN INTERLOCUTORY APPEAL FROM AN ORDER GRANTING INTERVENOR/APPELLEE'S INTERVENTION INTO A PRESERVATION OF ASSETS ACTION BROUGHT BY PLAINTIFF/APPELLANT PURSUANT TO § 77-38a-601, UTAH CODE ANNOTATED 2010, IN THE FOURTH JUDICIAL DISTRICT OF UTAH, UTAH COUNTY, THE HONORABLE FRED D. HOWARD PRESIDING.

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LIST OF ALL PARTIES

Plaintiff/Appellant
THE STATE OF UTAH, Represented by officials of the Utah County Attorney's Office, 100 E. Center Street, Suite 2100, Provo, UT 84606.

Defendants/Persons Appearing to Have an Interest in the Properties
LARRY O. BOSH, 356 South Main, Nephi, UT 84648

JULIE BOSH, 356 South Main, Nephi, UT 84648

(The) BOSH FAMILY TRUST, Jerry & Evelyn Bosh, Trustees, 58 West 500 South, Mona, Utah 84645

DAVID SHAWN BENSON, 235 South Puerto Dr., Ivins, Utah 84738.

HEIDI BENSON, 235 South Puerto Dr., Ivins, Utah 84738.

THE HEIDI J. BENSON FAMILY TRUST, Trustee Unknown, 235 South Puerto Dr., Ivins, Utah 84738.

CLARENCE DAVID BENSON, 45 Padre Canyon Drive, Ivins, Utah 84738.

Intervenor/Appellee
MONEY & MORE INVESTORS, LLC, 215 South Main Street, Suite 800, Salt Lake City, Utah 84111, Represented by attorneys from the law firm of PIA ANDERSON DORIUS REYNARD & MOSS, 299 S Main Street, Suite 1710, Salt Lake City, Utah 84111

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BRIEF OF APPELLEE

* * * * *

JURISDICTIONAL STATEMENT

The State appeals an interlocutory order allowing Appellee to intervene into an action brought by Appellant pursuant to the Preservation of Assets Statute, Utah Code Ann. § 77-38a-601 (West 2010). Appellee's intervention was granted pursuant to the trial court's conclusion that the Appellee qualified for intervention by right and by permissive intervention under the Utah Rules of Civil Procedure. This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(g). The trial court further concluded that the statute's notice requirement violates the due process provisions of the Constitution of Utah.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

I. Did the trial court properly grant Appellee an intervention of right under Rule 24(a) of the Utah Rules of Civil Procedure when Appellee claimed an interest relating to the property which is the subject of the action and when disposition of the action may impair or impede Appellee's ability to protect that interest?

"This court has not heretofore identified the standard it employs when reviewing a motion to intervene as of right under Utah Rule of Civil Procedure 24(a). *See Lima v. Chambers,* 657 P.2d 279 (Utah 1982) (reversing trial court's denial of intervention but not stating standard of review for that reversal). We now adopt a de novo standard of review when intervention as of right is before us on appeal." *In re Marriage of Gonzalez*, 2000 UT 28, 1 P.3d 1074, 1077 (Utah 2000).

II. Did the trial court properly grant Appellee permissive intervention under Rule 24(b) of the Utah Rules of Civil Procedure when Appellee's claim or defense and the main action have a question of law or fact in common?

"A trial court's grant of intervention pursuant to rule 24(b) involves the discretion of the trial court, and we will not overturn its ruling absent a clear abuse of discretion. Utah R.Civ.P. 24(b); *Republic Ins. Group v. Doman,* 774 P.2d 1130, 1131 (Utah 1989)." *State By & Through Utah State Dept. of Soc. Services v. Sucec*, 924 P.2d 882, 887 (Utah 1996).

III. Did the trial court properly address the constitutionality of Utah Code Annotated Section 77-38a-601 before concluding that the statute does not allow for adequate representation of parties who have an interest in the property which is the subject of the asset protection suit as required by the Due Process Clause of the Utah Constitution?

"'The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court.' *State v. Ross,* 2007 UT 89,

¶ 17, 174 P.3d 628 (quoting *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 7, 67 P.3d 436). 'Furthermore, we presume the legislation being challenged is constitutional, and we resolve any reasonable doubts in favor of constitutionality.' *Wood,* 2002 UT 134, ¶ 7, 67 P.3d 436." *State v. Drej*, 2010 UT 35, ¶ 9, 233 P.3d 476, 480 (Utah 2010).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following relevant constitutional and statutory provisions are attached in the **Addendum**:

1. Exhibit A – Utah Const. Art. I, § 7 (Due Process);
2. Exhibit B – Utah Code Ann. § 77-38a-601 (West 2010) (Preservation of Assets); and
3. Exhibit C – Utah R. Civ. P. 24 (a) (Intervention of Right) and (b) (Permissive Intervention).

STATEMENT OF THE CASE

On December 10, 2008, Appellee's counsel, on behalf of a majority of the Investors in a pay-day loan company called Money & More, Inc. (the "Victims"), who unknowingly invested in an on-going Ponzi scheme maintained by, among others, Defendants Larry Bosh and Shawn Benson (collectively the "Defendants"), filed a Complaint against Defendants in the United States District Court for the District of Utah (Case No. 2:08-cv-00951) (the "federal litigation"). (R. 735-782). To facilitate more efficient prosecution of the federal litigation, negotiation of settlements with the litigants, and the liquidation and disbursement Defendants' assets, those Victims caused Appellee to be formed and assigned their several rights, interests, and claims to Appellee in

exchange for membership interests in Appellee. (R. 251-256; R. 278- 279; R. 295-296; R. 605-676).

Appellee's counsel has since made great efforts to identify any remaining assets of Defendants and to obtain possession of said assets for liquidation and distribution of the proceeds to Appellee. Throughout this entire process, Appellee's counsel was in direct and regular communication with the lead investigator in the Office of the Utah County Attorney, a certain Mr. Richard Hale. (R. 1119-1147). Appellee's counsel shared a considerable amount of information with Mr. Hale, thereby creating a collaborative effort to assist Mr. Hale and the Victims with locating and obtaining any remaining assets of Defendants. (R. 1119-1147). Likewise, Mr. Hale shared information that he has learned during his investigation of Defendants, including informing Appellee's counsel about additional assets or potential assets which Appellee's counsel might pursue for Appellee. (R. 1119-1147).

Effective January 30, 2010, Appellee entered into a Settlement Agreement with Defendants (the "Bosh Settlement Agreement"). (R. 212-217). According to the terms of the Bosh Settlement Agreement, Bosh and Benson agreed, subject to the trial court's approval, to transfer ownership of their remaining unencumbered assets to Appellee for immediate liquidation and disbursement to the approximately 330 individuals and 40 entity members of Appellee. (R. 212-217). It took Appellee and Appellee's counsel more than one year of extensive litigation, investigations, and negotiations to arrive at a point where Appellee was able to recover what unencumbered assets of Defendants remain, and to achieve at least partial restitution for the Victims' losses.

Unbeknownst to Appellee, on September 30, 2009, the Utah County Attorney opened the present case and filed a petition for a temporary restraining order against Defendants. (R. 34-36). Following two hearings on the petition in the absence of Appellee, the trial Court granted the petition and issued a temporary restraining order on October 21, 2009. (R. 149-151). The restraining order prohibits Defendants from disposing of their assets, thereby preserving the same assets for potential restitution upon the successful conviction of Defendants and the issuance of a restitution order thereafter. (R. 149-151).

On February 10, 2010, Appellee filed a motion to lift the restraining order in order to carry out the purposes of the Bosh Settlement by distributing the assets described therein to Appellee and its members immediately. (R. 225-237). On April 14, 2010, Appellee filed a motion to formally intervene. (R. 568-573; R. 785-802). On April 23, 2010, Appellant responded in opposition to the motion. (R. 808-818). Oral argument was heard by the court on April 27, 2010, the Honorable Fred D. Howard presiding. (R. 818). At the conclusion of the hearing, the court granted Appellee's motion to intervene and requested Appellee to submit a proposed order with the court. (R. 818). On May 3, 2010, Appellee filed its proposed order with the court.[1] On May 6, 2010, Appellant filed an objection to Appellee's proposed order (R. 861-867), and contemporaneously therewith filed a proposed alternative order with the court. (R. 858-860). On June 11, 2010, the court entered a written order of its own drafting. (R. 991-993). Appellant appealed the

[1] Appellee's counsel could not find this document in the record, and therefore has attached Appellee's proposed order in the Addendum as Exhibit D – ORDER GRANTING MONEY & MORE INVESTORS, LLC'S MOTION TO INTERVENE.

order to the Utah Court of Appeals, but it was subsequently transferred to the Utah Supreme Court. (R. 1709-1710). Appellant challenges the trial court's order as improperly granting Appellee's intervention under Rule 24 (a) and (b) of the Utah Rules of Civil Procedure. Appellant further challenges the court's order as improperly deeming the inadequate notice provisions of § 77-38a-601 a violation of due process provisions of the Utah Constitution.

STATEMENT OF FACTS

From at least June 2007 through October 2008, Money & More, Inc. ("M&M"), Evolution Developments, LLC ("Evolution"), Gale Robinson ("Robinson"), Larry Bosh ("Bosh"), Shawn Benson ("Benson"), and Michael J. Smith ("Smith") (collectively "Defendants") worked on an integral basis with M&M and its CEO Robinson to raise approximately $59 million primarily from Appellee and a few other investors (collectively, the "Victims"), including an amount in excess of $47 million from the members of Appellee alone, in an egregious, on-going Ponzi scheme.[2] (R. 1061; R. 1108-1109; R. 1148).

Defendants defrauded Victims through the unregistered, fraudulent offer and sale of a bogus investment opportunity in M&M, which operates a deferred deposit loan transaction business in Hemet, California providing short-term payday loans and advances. (R. 1061; R. 1070-1117). Defendants represented to Victims that their

[2] A Ponzi scheme is a financial fraud that induces investment by promising extremely high, risk-free returns, usually in a short time period, from an allegedly legitimate business venture. "The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment." *In re United Energy Corp.*, 944 F.2d 589, 590 n.1 (9th Cir. 1991). *See generally Cunningham v. Brown*, 265 U.S. 1, 7-9 (1924) (detailing the remarkable criminal financial career of Charles Ponzi).

investment monies would be used solely and exclusively to fund new payday loans taken out by M&M's customers. (R. 1054; R. 1060-1061; R. 1097). Defendants further represented that in exchange for providing their investment capital, Victims would be paid, on a monthly basis, a portion of the profits earned by M&M from the payday loans funded using Victims' investment monies at a rate equal to ten percent (10%) per month of each Investor's total investment contribution (the "Fee Payments"). (R. 1055; R. 1060; R. 1106).

To induce Victims to make an investment in M&M, Defendants represented that M&M's financial status was strong and stable, claiming that investments in M&M were earning returns of at least 10% to 14% per month from the extraordinary amount of profits earned by M&M. (R. 1055; R. 1060; R. 1106-1107). Defendants also provided certain financial records of M&M to Victims that Defendants represented were both accurate and provided unequivocal support to their claims regarding M&M's financial strength. (R. 1045-1049; R. 1060; R. 1106).

Defendants' representations that M&M was earning an extraordinary amount of profits from its payday loan business were absolutely false. (R. 1060). Likewise, Defendants' claim that investments in M&M were earning monthly returns of at least 10% to 14% were also untrue. (R. 1060). Instead, beginning in January 2008, at the latest, and continuing each month thereafter, while Defendants touted M&M's financial strength in order to raise millions from Investors, M&M was incurring losses that ranged from approximately $2.7 million to in excess of $11.7 million per month. (R. 1045-1049; R. 1060). In addition, Defendants extensively manipulated and falsified the information

and data contained in the financial records of M&M which Defendants provided to Investors, in order to conceal M&M's massive monthly losses from its payday loan business's operations. (R. 1045-1049; R. 1059-1060).

Furthermore, contrary to their representations and promises, Defendants failed to use the investment funds obtained through their scheme from Victims exclusively to fund customer payday loans. (R. 1059). Instead, Victims' investment funds were commingled into one or two bank accounts belonging to M&M and then pervasively misused by Defendants for unauthorized and undisclosed purposes, including, among other things, the purchase of a personal residence by Robinson for approximately $1.6 million, the undisclosed payment of sales commissions and management fees to Bosh, and the payment of the operating costs and expenses of M&M, and at least one additional business owned by Robinson. (R. 1049-1050; R. 1059). Defendants also used a substantial portion of the investment funds to make interest payments (i.e. the Fee Payments) to previous investors, effectively operating a Ponzi scheme. (R. 1059).

Through their conduct, Defendants have, among other things, violated the antifraud and registration provisions of the federal securities laws, engaged in conspiracy and common law fraud, and breached virtually every term of the investment agreements entered into with each Victim in connection with their investments in M&M. (R. 1059; R. 1070-1092). As a result of Defendants' actions, the majority of the investment funds provided by Victims have been stolen or lost though misappropriation and/or mismanagement. (R. 1058-1059; R. 1070-1092). However, the Victims still possess an opportunity through the previously referenced federal litigation (Case No. 2:08-cv-

00951) and the Bosh Settlement Agreement to recover a portion of their respective share of their investment funds (and assets purchased therefrom) from M&M's current outstanding accounts receivable, Robinson's home, and certain personal and real property assets currently owned by Bosh, Benson, and related parties. (R. 212-217; R. 735-782; R. 1058). The Victims have settled with M&M and Robinson and have taken ownership of all accounts receivable of the Company and related assets. (R. 212-217; R. 1058).

SUMMARY OF ARGUMENT

It is Appellee's position that the trial court properly granted Appellee's motion to intervene under Rule 24 of the Utah Rules of Civil Procedure into an asset preservation action brought by Appellant under § 77-38a-601, Utah Code Annotated. The trial court properly evaluated Rule 24's application to Appellee's motion to intervene. Further, the trial court properly applied correct analysis of Article I, § 7 of the Constitution of the State of Utah to the action.

The bases asserted for and against Appellee's motion to intervene, both by the filed pleadings and oral arguments of Appellee and Appellant, fully set forth the requirements for both an intervention of right and permissive intervention by Appellee pursuant to Rule 24 of the Utah Rules of Civil Procedure. The lower Court's ruling was properly based on the parties' complete briefing of the application of Rule 24 to the facts of this case.

Additionally, Appellee fully addressed the constitutionality of § 77-38a-601 when it argued that it, on behalf of Victims, has an interest relating to the property at issue, that Appellant committed error in not serving notice of the asset protection suit or its motion

for temporary restraining order, which resulted in the existing temporary restraining order—all in violation of the notice provisions of § 77-38-601. Furthermore, Appellee's filed memoranda and oral argument before the trial court reiterate the fact that Appellee, as a party with an interest relating to the property at issue, had been through more than a year of investigation, settlement negotiations and litigation with and against Defendants. During this extensive period, Appellant had full knowledge of Appellee's rights, interests, and claims, and remarkably participated hand-in-hand with Appellee. Appellant's concealment of the asset protection suit was, therefore, all the more improper.

Based primarily on the arguments made before the trial court as to the constitutionality of § 77-38a-601 and Appellant's non-compliance with its notice provisions, the trial court entered the following conclusions of law as part of its Order allowing Appellee intervention into the asset protection suit: (1) that § 77-38a-601, Utah Code Annotated, affects the property rights of persons who are not given notice in violation of provision and requirements of the Utah Constitution; (2) that the statute does not allow for adequate representation of parties who have an interest in the property which is the subject of the asset protection suit; (3) that an individual who learns that his property has become the subject of an injunction order without notice has the right to intervene and to participate because it affects his fundamental right under the Constitution of the State of Utah that his property not be seized or taken without due process; (4) that the statute does not define who constitutes a victim or who constitutes the perpetrator of the criminal act; (5) that the statute requires [the] court to determine

who the victims are; and (6) that the rights provided by the Constitution of the State of Utah have an overriding effect on the statute.

The trial court's Order properly analyzed Appellee's motion to intervene under Rule 24 of the Utah Rules of Civil Procedure, and Article I, § 7 of the Constitution of the State of Utah. Therefore, the trial court did not commit error when it granted Appellee intervention into the asset protection action.

ARGUMENT

The trial court properly granted Appellee's motion to intervene. First, Appellee does have a right to intervene under Rule 24(a), Utah Rules of Civil Procedure. Second, Appellee is entitled to permissive intervention under Rule 24(b) of the Utah Rules of Civil Procedure. Finally, the trial court did not err in concluding that § 77-38a-601 violates constitutional mandates.

I. THE TRIAL COURT PROPERLY HELD THAT APPELLEE HAD A RIGHT TO INTERVENE UNDER RULE 24(A) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 24(a) states:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In *Lima*, this Court held that under Rule 24(a) mandatory intervention,

> [A]n applicant must be allowed to intervene if four requirements are met: 1) the application is timely; 2) the applicant has an interest in the subject matter of the

> dispute; 3) that interest is or may be inadequately represented; and 4) the applicant is or may be bound by a judgment in the action.

Chatterton v. Walker, 938 P.2d 255, 258 (Utah 1997) (citing *Lima*, 657 P.2d 279, 282 (Utah 1982)). Significantly, the Court has further held since *Lima* that

> Rule 24(a) has been amended. It now states in pertinent part:
>
> Upon timely application anyone shall be permitted to intervene in an action ... when the applicant *claims an interest* relating to the property or transaction which is the subject of the action and he is so situated that the *disposition of the action may as a practical matter impair or impede his ability to protect that interest*, unless the applicant's interest is adequately represented by existing parties.
>
> Instead of requiring applicants to show that they will be "bound by a judgment in the action," the rule now requires applicants to demonstrate only that "the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." Thus, the text of Rule 24 now mandates intervention on even more liberal terms than it did when we issued *Lima.*

Id. (emphasis added). Appellee readily satisfies these more liberal requirements.

A. Appellee timely filed its motion to intervene.

First, Appellee timely filed its motion to intervene. This Court previously held that "[u]se of the word 'timely' in the Rule requires that the timeliness of the application be determined under the facts and circumstances of each particular case, and in the sound discretion of the court." *Republic Ins. Group*, 774 P.2d at 1131 (Utah 1989) (citing *Jenner v. Real Estate Services*, 659 P.2d 1072, 1073-74 (Utah 1983)). Additionally, intervention is permitted even after entry of judgment upon a "strong showing of entitlement and justification, or such unusual or compelling circumstances as will justify the failure to seek intervention earlier." *Jenner*, 659 P.2d at 1074 (citing *Rain v. Lewis*, 579 P.2d 980 (Wash. App. 1978)).

In the instant matter, Appellee has made a sufficient showing of entitlement and justification for its failure to seek intervention at an early stage in the proceedings. As a real party in interest and representative for a majority of the Victims who invested in the Ponzi scheme maintained by, among others, Defendants Bosh and Benson, Appellee was entitled to notice of Appellant's suit, petition for a temporary restraining order, and injunction on Defendants' assets. *See* Utah Code Ann. § 77-38a-601 (West 2010); *see also* R. 991-993. Despite whatever alleged efforts Appellant claims it made in satisfying the notice requirements of § 77-38a-601 in notifying "interested" parties, Appellant failed to notify the one party they actually knew had an interest in the property: Appellee. *See* R. 991-993. Upon knowledge of Appellant's petition for a temporary restraining order against Defendants' assets, Appellee took immediate steps to protect its interests in Defendants' assets by filing a motion to terminate the restraining order and by filing a motion to intervene. (R. 225-237). Accordingly, the trial court properly granted Appellee's motion to intervene, and substantial prejudice will result to the Victims if permission to intervene is denied.

B. Appellee demonstrated an interest in the subject matter.

Second, Appellee has demonstrated an interest in the subject matter. This Court has previously held, "To justify intervention, the party seeking intervention must demonstrate a direct interest in the subject matter of the litigation such that the intervenor's rights may be affected, for good or for ill." *Lima*, 657 P.2d at 282 (citing *State v. Craig*, 364 S.W.2d 343 (Mo. App. 1963)).

In the present matter, it is indisputable that Victims have direct and cognizable claims not only against Defendants Bosh and Benson, but especially against the property at issue in this case. Defendants admit in their depositions that they raised money from the Victims:

> Question: "About how much money do you think you helped refer to Money & More in addition to the $7.3 million?
>
> Answer: ... It was anywhere between probably $35-45 million."

(R. 686). Defendants improperly took a fee of 11.66% on a monthly basis in violation of the previously cited statutes and regulations. The total amount of money inappropriately taken by Defendants was approximately $5.1 million. The list of expenditures made by Bosh and Benson including what little remains of any collectible assets is listed in Exhibit 38 to their depositions. (R. 680-682). Those same assets are frozen under the existing temporary restraining order. Moreover, Appellant was well aware of Appellee's claims to the property at issue through Appellant's extensive interaction and involvement with Appellee's previous investigation into Defendants' assets through Mr. Hales, an investigation which started in 2008. (R. 1119-1147).

Appellee further denies Appellant's unfounded allegation that Appellee has in any way violated the trial court's restraining order. Without any proffer of evidence to support its claim, Appellant somehow misinterpreted Appellee's direct claims to the property at issue described above as a "transfer" of Defendants' assets to Appellee. The trial court already reviewed this issue when, in response to Appellant's Motion for Order to Show Cause as to why Defendants and Appellee should not be held in contempt for

allegedly transferring Defendants' assets in violation of the temporary restraining order, it held that "[Appellant] is seeking to hold Defendants [and Appellee] in contempt without sworn testimony to support those facts. Plaintiff's request is therefore procedurally defective and the Court respectfully declines to issue an order to show cause. (R. 841-848). As previously stated, any hypothecation of Defendants' assets pursuant to the Bosh Settlement Agreement is conditional upon the termination of the temporary restraining order in place.

The property at issue in this civil *en rem* action is the very property the Victims claim rights to. Thus, Appellee, in its representative capacity for and on behalf of Victims, is a proper intervenor of right under Rule 24(a).

i. **Appellee is a victim in this matter and has an interest in the property at issue.**

Appellant's conclusion that Appellee is not an interested party or a victim in this matter is simply wrong. The fact that § 77-38a-601 does not mention the word "victim" is of no consequence. The same statute was created for the preservation of assets wrongfully obtained or retained as the result of criminal activity for eventual restitution. In fact, the statute mentions the word "restitution" five times throughout. Utah Code Ann. § 77-38a-601 (West 2010). Appellee and its investor members, as interested parties and victims in the present action, constitute nearly all of the entities to whom restitution is expected to be made. In the words of Appellant, "The single purpose of this type of action is found in the statute – to preserve assets in anticipation of an order of restitution .

. . ," i.e., the Victims. Appellant's Brief, p. 16. The Victims' interests are sufficient for purposes of claiming an interest in the property at issue.

ii. Utah Code Annotated §§ 77-37-1 and 77-38-1, *et seq.*, do not negate Appellee's interest in the property at issue.

Appellee is rightfully a party to this matter. This Court has previously recognized the common principle that "an assignee stands in the shoes of its assignor." *Sunridge Development Corp. v. RB & G Engineering, Inc.*, 2010 UT 6, ¶¶ 2-3, 230 P.3d 1003, reh'g denied (Apr. 22, 2010). Accordingly, "[A]n assignee should [] be given the chance to fully litigate the rights it claims to have acquired by assignment . . . and defend against any limitations on the effect of the assignment alleged by the third-party . . ." *Id.* "Assignees of a claim, including assignees for collection, have long been permitted to bring suit." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 431 (2006). Courts allow "suit by the assignee of a cause of action even though the assignors expect[] to receive the amount recovered in the action, because the assignee, as 'legal holder of the claim,' is 'the real party in interest.'" *Id.* at 434. The lower court found this black letter law persuasive in allowing intervention by Appellee.

As previously set forth, in order to help facilitate and simplify prosecution of the federal case against Defendants, negotiation of settlements with the litigants, and the liquidation and disbursement Defendants' assets, each of the Victims assigned their rights, claims, and harms to Appellee in exchange for membership in Appellee—an entity created for the sole purpose of collecting on Victims' claims and making disbursements. (R. 251-256; R. 278- 279; R. 295-296; R. 605-676). As such, it is clear that Appellee has

every right to assert its claims with regard to the property at issue as it stands in the shoes of the Victims as the real party in interest.

By helpful comparison, it is universally understood that, as stated under the Bill of Rights of the Utah Code of Criminal Procedure, "[v]ictims may seek restitution or reparations" for their losses. Utah Code Ann. § 77-37-3(1)(e) (West 2010). Furthermore, the Crime Victims Restitution Act provides that no provision of the statute can "limit or impair the right of the person injured by a defendant's criminal activities to sue and recover damages in a civil action." Utah Code Ann. § 77-38a-403(1) (West 2010). By and through Appellee's intervention, Appellee seeks to protect its rights in the property at issue—the property that was wrongfully obtained by the ill-gotten gains of Defendant. The trial court's grant of Appellee's motion to intervene as a rightful party with an interest in the property at issue was proper.

Despite Appellant's claims to the contrary, Utah Code Annotated §§ 77-37-1 and 77-38-1, *et seq.*, do not negate Appellee's involvement as representative for Victims in this matter. Not one of the statutes listed by Appellant in its brief as support for its contention that Appellee is not a proper party to this matter provides any basis for Appellant's position. *See* Utah Code Ann. §§ 77-37-1 and 77-38-1 *et seq.* (West 2010). The statutes speak to the definition, the duties of and the duties owed to victims of crime, but do not disregard Appellee's right to intervene in this matter. *See id.* Appellant relies solely on its own nuanced interpretation of the same statutes without any reference to supporting or mandatory authority.

Furthermore, Appellant misapplies the definition of "victim" to the facts of this case. Utah Code Annotated § 77-38-2(9)(a) provides that a victim of a crime "means a natural person against whom the charged crime or conduct is alleged to have been perpetrated." West (2010). Section 77-38a-102(14)(a) indicates that a victim "means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities." Utah Code Ann. (West 2010). The actual asset protection statute requires "notice to persons appearing to have an interest in the property and affording them the opportunity to be heard. . ." Utah Code Ann. § 77-38a-601 (West 2010). Lastly, Section 77-38a-102(14)(b) provides that a victim "may not include a codefendant or accomplice." Utah Code Ann. (West 2010).

In the present proceeding, Appellant claims that as many as 70% of the victims listed as members of Appellee are currently "under suspicion" of being involved in the Ponzi scheme at issue "on some level." Appellant's Brief, p. 18. This conjecture is complete speculation without any support whatsoever. One thing is for certain, Appellant is on an unsubstantiated witch hunt against the very victims it is charged with protecting. There is no evidence in the record that Appellee is or has ever been criminally involved in Defendants' Ponzi scheme. Furthermore, there is no statute that limits the consolidated representation of Victims by Appellee, particularly in light of the more than 330 individuals who are members of Appellee's constituent entities. Appellant's bad faith, unsupported claim that Appellee or Appellee's members are not victims, but in fact co-conspirators, is no basis for denying intervention.

iii. **Neither Utah Code Annotated § 77-38a-1 nor Rule 17(a) of the Utah Rules of Civil Procedure negates Appellee's interest in the property at issue.**

Appellant asserts that § 77-38a-1 and Rule 17(a) of the Utah Rules of Civil Procedure do not recognize Appellee or the Victims it represents as parties in interest. Neither the aforementioned statute or rule precludes Appellee or Victims from representation as parties in interest in the case at bar. *See* Utah Code Ann. § 77-38a-1 (West 2010); Utah R. Civ. P. 17(a) (2010). While Appellee is undoubtedly a party in interest pursuant to the asset protection statute, it is also considered a necessary party by the Utah Civil Rules of Procedure. Utah Code Ann. § 77-38a-601 (West 2010); Utah R. Civ. P. 19(a) (2010). Rule 19(a) indicates that a "necessary party" to an action, who must be joined if feasible, is one whose presence is required for a full and fair determination of his rights. *Green v. Louder*, 2001 UT 62, ¶ 44, 29 P.3d 638, 649 (Utah 2001).

As discussed above, it is undeniable that Victims have direct and cognizable claims not only against Defendants Bosh and Benson, but especially against the property at issue in this case. Defendants' admissions that they raised money from the Victims demonstrate the direct connection between Appellee's resulting pecuniary loss. (R. 685-687). Those of Defendants' frozen assets are not only to be used in making restitution to Victims, but are also named in the Bosh Settlement Agreement as eventual satisfaction of Defendants' debt to the same Victims. (R. 212-217). As such, Appellee is indeed a necessary party to this action and a real party in interest as disposition of the property at issue will substantially affect the restitution owed to Appellee on behalf of Victims.

Appellant further purports that Utah Code Annotated § 77-38a-601 does not grant Appellee authority to intervene nor the trial court power to determine who victims are or might be, their interest in the property, or how the property will be partitioned. (West 2010). In fact, the statute is silent with regard to intervention. It is precisely for this reason that the trial court properly entered the following findings of fact and conclusions of law: (1) that § 77-38a-601, Utah Code Annotated, affects the property rights of persons who are not given notice in violation of provision and requirements of the Utah Constitution; (2) that the statute does not allow for adequate representation of parties who have an interest in the property which is the subject of the asset protection suit; (3) that an individual who learns that his property has become the subject of an injunction order without notice has the right to intervene and to participate because it affects his fundamental right under the Constitution of the State of Utah that his property not be seized or taken without due process; (4) that the statute does not define who constitutes a victim or who constitutes the perpetrator of the criminal act; (5) that the statute requires [the] court to determine who the victims are; and (6) that the rights provided by the Constitution of the State of Utah have an overriding effect on the statute. *See* Utah Code Ann. § 77-38a-601 (West 2010).

Due to the overriding effect of the Constitution of the State of Utah based on Appellant's failure to notify Appellee's of its petition for temporary restraining order over Defendants' assets in which Appellee has a direct and discernible interest, the trial Court could not ignore the violation of Appellee's due process rights on behalf of Victims. Accordingly, the trial court's grant of intervention by Appellee was proper.

C. Appellee's interest is not adequately represented by Appellant.

While the burden of showing that the representation by parties is on the applicant, "[T]his burden is a minimal one, requiring the intervenor to show only some evidence that the existing parties may not adequately represent its interests." *Beacham v. Fritzi Realty Corp.*, 2006 UT App 35, ¶ 8, 131 P.3d 271, 274 (UT App. 2006). Based on the pleading, motions and memoranda filed by Appellant to date, it is clear that Appellant does not want Victims to be heard, wants to disregard Victims' constitutional due process rights, wants to remove Victims from the present proceeding, and wants to ensure that Victims do not receive Defendants' assets. The State is unfortunately taking a "big brother knows best" position against the express wishes of the Victims. This counterproductive approach does not make any sense. Many of the Victims have lost their life savings, have gone bankrupt, and are now destitute because they invested in Defendants' Ponzi scheme. The Victims want to move on with their lives, but Appellant will not let them. Accordingly, Appellant does not adequately represent Appellee's interests.

D. Appellee is bound by the trial court's judgment and disposition of the action may as a practical matter impair or impede Appellee's ability to protect its interest.

Disposition of the present action, as a practical matter, impairs and impedes Appellee's ability to protect its interest in the property at issue. Appellee has a conditional settlement agreement with Defendants that requires the removal of the lower court's temporary restraining order. (R. 217). Without Appellee's intervention, Appellee hands are tied and are powerless in protecting its interests in Defendants' assets. As

such, the trial court's grant of intervention by Appellee is in line with the statutory requirements permitting intervention where (1) Appellee is bound by the court's judgment, and (2) the action as a practical matter impairs or impedes Appellee's ability to protect its interest in the property at issue.

II. THE TRIAL COURT PROPERLY GRANTED APPELLEE PERMISSIVE INTERVENTION UNDER RULE 24(B) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 24(b) states,

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(Emphasis added). Additionally, a trial court's grant of intervention pursuant to rule 24(b) "involves the discretion of the trial court, and we will not overturn its ruling absent a clear abuse of discretion." *Sucec*, 924 P.2d at 887 (citing *Republic Ins. Group*, 774 P.2d at 1131).

In the present matter, the trial court properly granted Appellee permissive intervention under Rule 24(b). First, as previously discussed, Appellee's motion was timely filed. The only reason it was not filed before the temporary restraining order was issued was because Appellant failed to provide notice to Appellee of its case and petition for temporary restraining order and injunction before the trial court despite having been in regular communication with Appellee for months prior.

Second, Appellee's claims and arguments have a confluence of questions of law and fact in common with Appellant's case. The core questions are the fraud and

improper money raising by Defendants. A brief review of the State's Motion for Temporary Restraining order and the Victims' Amended Federal Complaint show that the facts and circumstances giving rise to the claims and the claims themselves are identical. (R. 1-9; R. 26-33; R. 735-782).

Third, the trial court did not abuse its discretion in granting the intervention by Appellee because there was no undue delay or prejudice to the adjudication of the rights of the original parties. Appellant can only point to the fact that it had to "readdress" the restraining order upon Appellee's motion to intervene in the present matter. Appellant's Brief, p. 24. Such inconvenience can hardly be construed as an undue delay or prejudice to the adjudication of Appellant's rights especially since Appellee should have been involved in the proceedings in the first place. Accordingly, the trial court properly granted Appellee permissive intervention.

III. THE TRIAL COURT CORRECTLY ADDRESSED THE CONSTITUTIONALITY OF UTAH CODE ANNOTATED SECTION 77-38A-601 HOLDING THAT IT VIOLATES THE UTAH CONSTITUTION.

While the constitutionality of Utah Code Annotated § 77-38a-601 is an issue of first impression, the Fourteenth Amendment clearly prohibits states from depriving its citizens of property without due process of law. Both the United States Constitution and the Constitution of the State of Utah require due process of law before the State may deprive a person of his property. U.S. Const. Amend. XIV, § 1; Utah Const. Art. I, § 7. Appellant argues that the trial court did not follow a five-factor test for constitutional analysis crafted by Appellant itself. However applicable Appellants self-fashioned test may or may not be to the present case, the trial court nonetheless has complied with all

five factors. First, there is no indication in the record that the trial court did not presume the statute at issue to be constitutional before conducting its own analysis of the pertinent constitutionality issues. The State has not provided adequate legal analysis establishing error by the trial court. The State's conclusory statements should be dismissed out of hand. Second, the trial court properly determined that Appellee had standing to intervene in the present action and granted Appellee's intervention accordingly. Third, the trial court's Order indicated its decision was based on the pleadings on file and the arguments of counsel for the parties, thereby satisfying Appellant's third prong of addressing the facts of the case. Fourth, there is no indication in the record that the trial court did not consider the statute's construction before issuing its order. And finally, as admitted by Appellant, the constitutionality of the statute is an issue of first impression, without any case law precedence.

The trial court in fact did follow the proper protocols in addressing the constitutionality of Utah Code Annotated § 77-38a-601. As such, the trial court did not abuse its discretion in determining that the same statute affects the property rights of persons who are not given notice in violation of provision and requirements of the Constitution of the State of Utah by not providing adequate representation of parties who have an interest, or claimed interest, in the property at issue. Because the statute does not provide for adequate notice to individuals whose property has become subject to an injunction order, the trial court properly held that the same individuals have a right to intervene as the injunction affects the individuals' fundamental right under the

Constitution of the State of Utah that his property not be seized or taken without due process.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the trial court's granting of Appellee's motion to intervene and its conclusions of law that Utah Code Annotated § 77-38a-601 operates in violation of due process provisions of the Constitution of the State of Utah.

Respectfully submitted this 4TH day of February, 2011.

PIA ANDERSON DORIUS REYNARD & MOSS

Joseph G. Pia
Nathan Dorius
Attorneys for Appellee

ADDENDUM

EXHIBIT A

West's Utah Code Annotated

Constitution of Utah

Article I Declaration of Rights

U C.A. 1953, Const. Art. 1, § 7

Sec. 7. [Due process of law]

Currentness

No person shall be deprived of life, liberty or property, without due process of law

Notes of Decisions (559)

Current through 2010 General Session, including results from the November 2010 General Election

EXHIBIT B

§ 77-38a-601. Preservation of assets, U.C.A. 1953 § 77-38a-601

West's Utah Code Annotated

Title 77. Utah Code of Criminal Procedure

Chapter 38A. Crime Victims Restitution Act (Refs & Annos)

Part 6. Preservation of Assets

U.C.A. 1953 § 77-38a-601

§ 77-38a-601. Preservation of assets

Currentness

(1) Prior to or at the time a criminal information, indictment charging a violation, or a petition alleging delinquency is filed, or at any time during the prosecution of the case, a prosecutor may, if in the prosecutor's best judgment there is a substantial likelihood that a conviction will be obtained and restitution will be ordered in the case, petition the court to:

(a) enter a temporary restraining order , an injunction, or both;

(b) require the execution of a satisfactory performance bond ; or

(c) take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order.

(2)(a) Upon receiving a request from a prosecutor under Subsection (1), and after notice to persons appearing to have an interest in the property and affording them an opportunity to be heard, the court may take action as requested by the prosecutor if the court determines :

(i) there is probable cause to believe that a crime has been committed and that the defendant committed it, and that failure to enter the order will likely result in the property being sold, distributed, exhibited, destroyed, or removed from the jurisdiction of the court, or otherwise be made unavailable for restitution; and

(ii) the need to preserve the availability of the property or prevent its sale, distribution, exhibition, destruction, or removal through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(b) In a hearing conducted pursuant to this section, a court may consider reliable hearsay as defined in Utah Rules of Evidence, Rule 1102.

(c) An order for an injunction entered under this section is effective for the period of time given in the order.

(3)(a) Upon receiving a request for a temporary restraining order from a prosecutor under this section, a court may enter a temporary restraining order against an owner with respect to specific property without notice or opportunity for a hearing if:

(i) the prosecutor demonstrates that there is a substantial likelihood that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this chapter; and

(ii) provision of notice would jeopardize the availability of the property to satisfy any restitution order or judgment.

(b) The temporary order in this Subsection (3) expires not more than 10 days after it is entered unless extended for good cause shown or the party against whom it is entered consents to an extension.

(4) A hearing concerning an order entered under this section shall be held as soon as possible, and prior to the expiration of the temporary order.

Credits

Laws 2004, c 160, § 1, eff May 3, 2004, Laws 2009, c 265, § 1, eff May 12, 2009

Current through 2010 General Session, including results from the November 2010 General Election.

EXHIBIT C

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part IV. Parties

Utah Rules of Civil Procedure, Rule 24

RULE 24. INTERVENTION

Currentness

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact. The court shall permit the state to be heard upon timely application.

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the county or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the county or municipal attorney of such fact. The court shall permit the county or municipality to be heard upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted.

Credits

[Amended effective January 1, 1987; November 1, 2003; April 1, 2004.]

Notes of Decisions (57)

Current with amendments effective November 1, 2010.

RULE 24. INTERVENTION, Utah Rules of Civil Procedure, Rule 24

End of Document

EXHIBIT D

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. LARRY O. BOSH, and D. SHAWN BENSON, *et al.* Defendants,	ORDER GRANTING MONEY & MORE INVESTORS, LLC'S MOTION TO INTERVENE Case No. 090403630 Judge: HOWARD

THIS MATTER CAME BEFORE THIS COURT on April 27, 2010 at 10:30 a.m. on a regularly scheduled hearing on Money & More Investors, LLC's motion to intervene. Money & More Investors, LLC was represented by Nathan S. Dorius and Joseph G. Pia of the firm Pia Anderson Dorius Reynard & Moss, and the State was represented by Curtis L. Larson of the Utah County Attorney's Office. The Court having considered the pleadings on file and the arguments of counsel for the parties on Money & More Investors, LLC's motion to intervene, the Court now enters the following findings of fact, and conclusions of law:

FINDINGS OF FACT/CONCLUSIONS OF LAW

1. The asset protection statute is designed to preserve assets for a valid reason and purpose, but

affects the property rights of persons who are not given notice in violation of provision and requirements of the Constitution of the State of Utah.

2. The statute does not allow for adequate representation of parties who have an interest in the property which is the subject of the asset protection suit.

3. An individual who learns that his property has become the subject of an injunction order without notice has the right to intervene and to participate because it affects his fundamental right under the Constitution of the State of Utah that his property not be seized or taken without due process.

4. The statute does not define who constitutes a victim or who constitutes the perpetrator of the criminal act.

5. The statute requires this court to determine who the victims are.

6. The rights provided by the Constitution of the State of Utah have an overriding effect on the statute.

7. Money & More is granted permissive intervention.

8. Money & More is granted intervention of right.

ORDER

THE COURT having now entered appropriate findings of fact and conclusions of law, and being fully apprised upon the premises, enters the following:

BE IT ORDERED AND DECREED:

1. That Money & More Investors, LLC's motion to intervene is, GRANTED.

SO ORDERED this _____ day of _____, 2010.

_____
JUDGE FRED D. HOWARD
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2010, a true and correct copy of the foregoing Objection and request for hearing was sent via first class mail, postage prepaid to the following:

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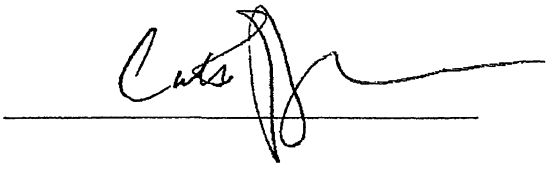

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, I caused to be sent via regular mail, first-class postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE**:

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